Supreme Court, U.S.
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No. 96 219

IN THE

Supreme Court of the United States

October Term, 1996

MARVIN NOEL,

Petitioner,

vs.

INTERNATIONAL CABLEVISION, INC.
d/b/a ADELPHIA CABLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a transmission by coaxial cable constituting a *wire* communication, as that term is defined in the Communications Act of 1934, as amended, may at the same time be treated as a *radio* communication for purposes of applying the enforcement provisions of the statute.

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OTHER AUTHORITY:

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Petitioner, Marvin Noel, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 26, 1996, and the subsequent denial of the Petition for Rehearing on May 10, 1996.

OPINIONS BELOW

The United States District Court for the Western District of New York, the Honorable John T. Curtin, District Judge, granted the Respondent's motion for summary judgment pursuant to Title 47 United States Code §553 and granted Petitioner's motion to dismiss the claims of the Respondent pursuant to Title 47 United States Code §605. On January 26, 1996, the United States Court of Appeals for the Second Circuit vacated that judgment, found §605 applicable to the sale of a cable descrambler, and remanded the case for the imposition of statutory damages and mandatory costs, including attorney fees, in accordance with §605. The Second Circuit denied Petitioner's motion for rehearing *in banc* on May 10, 1996.

JURISDICTION

Judgment of the Second Circuit was entered on January 26, 1996, and rehearing was denied on May 10, 1996. This Court obtains jurisdiction to consider this petition from the final judgment of a Court of Appeals pursuant to Title 28 United States Code §1254.

STATUTORY PROVISIONS

Section 153 of Title 47, United States Code, defines a "wire communication" as follows:

> (a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Section 153 of Title 47, United States Code, defines "radio communication" as follows:

> (b) "Radio communication" or communication by radio" means the transmission by radio of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Section 553 of Title 47, United States Code, as here pertinent, provides as follows:

> **(a) Unauthorized interception or receipt or assistance in intercepting or receiving service; "assist in intercepting or receiving" defined.**
>
> 1) No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.
>
> 2) For the purpose of this section, the term "assist in intercepting or receiving" shall include the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may

be) for unauthorized reception of any communication service offered over a cable system in violation of subparagraph (1).

Section 605 of Title 47, United States Code, provides in relevant part as follows:

> **(a) Practices prohibited**
>
> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

STATEMENT OF THE CASE

On April 9, 1991 and again on April 18, 1991, employees of the Respondent, International Cablevision, arranged for the Petitioner, Marvin Noel, to sell them two devices, commonly known as "black boxes", having the capability to descramble Cablevision's encrypted coaxial cable transmissions. Cablevision then initiated a civil suit in the Western District of New York against Mr. Noel, proceeding under two different sections of the Cable Communications Policy Act of 1984, as amended, Title 47 United States Code Sections 553 and 605.

At the direction of the district court, the parties filed written arguments addressing the question of whether or not §605 could be found applicable to the unauthorized interception of a cable company's coaxial cable transmissions between the cable head-end and a subscriber. On August 12, 1994, the district court awarded summary judgment in favor of Cablevision as to its claims under §553, but dismissed Cablevision's cause of action under §605. After conducting a detailed analysis of the history of §605, and considering the circumstances surrounding the enactment of §553 in 1984, including pertinent portions of the legislative history, the district court concluded the pertinent provisions of §605, and its far more onerous penalties, were intended to address the unauthorized interception of a "radio communication", as defined in §153(b) of Title 47, only. The district court concluded the retransmission of a radio communication from the cable company by coaxial cable to a subscriber constituted a "wire communication", as that term is defined in §153(a) of Title 47, and that any unauthorized interception of those coaxial cable transmissions through the use of a descrambling device was intended by Congress to be governed by §553.

On May 17, 1995, the Respondent's appeal was heard by a panel of Second Circuit judges. Over eight months later, on January 26, 1996, the court vacated the decision of the district court and remanded the case, finding that §605 does apply to the unauthorized interception of a transmission by coaxial cable if the signal being intercepted originated as a radio communication. *International Cablevision, Inc. d/b/a Adelphia Cable v. John Sykes and Marvin Noel*, 75 F.3d 123 (2d Cir. 1996). In reaching this result, the Second Circuit expressly concluded such retransmitted signals were at the same time both "wire" and "radio" communications under the statutory framework and that the enforcement provisions of both §553 and §605 were intended by Congress to be applicable to those signals.

The Petitioner made a request for a rehearing *in banc*, which was denied, and this Writ for Certiorari follows.

REASONS FOR GRANTING THE WRIT

There is a clear conflict within the circuit courts on this issue. In the case at bar, the Second Circuit has inexplicably decided the sale of cable descramblers can be prosecuted under Title 47 United States Code §605, while the Seventh Circuit, in *United States v. Norris*, 1996 WL 368877 (7th Cir. 1996), has correctly held that §533 is the only statute that applies to the distribution of these devices.

The foundation for the Second Circuit's determination is the wholly unsupported premise Congress intended the terms "wire communication" and "radio communication," as separately defined in Section 153 and utilized independently throughout Title 47, to overlap. In *Norris*, the Seventh Circuit explicitly disagreed with the holding of the Second Circuit in this case. Recognizing that throughout its history Congress has consistently treated "wire" and "radio" communications as distinct and mutually exclusive, the Seventh Circuit determined Congress must have intended to continue the separate treatment of these transmissions under the Cable Communications Policy Act of 1984. *Id.* at 4. Accordingly, the court held that, "[t]he only plausible, consistent interpretation . . . is that Congress intended for §605 to apply to the unlawful interception of cable programming transmitted through the air, while it intended for §553 to apply to the unlawful interception of cable programming while it is actually being transmitted over a cable system." *Id.* at 8.

The Seventh Circuit holding follows the legislative history of the Cable Communication Policy Act of 1984:

> The Committee intends the phrase "service offered over a cable system" to limit the applicability of [§553] to theft of a service **from the point at which it is actually being distributed over a cable system.** Thus, situations arising with respect to the reception of services which are transmitted over-the-air (or through another technology), but which are also distributed over a cable system, continue to be subject to resolution under section 605 **to the extent reception or interception occurs prior to or not in connection with** distribution of the service over a cable system... Hence, [§553(a)(2)] is primarily aimed at preventing the manufacture and distribution of so-called "black boxes" and other unauthorized converters which permit reception of cable service without paying for the service.

H.R. Rep. No. 934 at 83, reprinted in 1984 U.S.C.C.A.N. 4720 (emphasis added). In contrast, the Second Circuit chose to give no controlling weight to this unmistakably clear expression of legislative intent.

CONCLUSION

Due to the direct conflict between the Second and Seventh Circuits with respect to the intended application of the terms "wire" and "radio" communications under the Communications Policy Act, as amended, Petitioner, Marvin Noel, prays this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

DATED: Buffalo, New York
August 5, 1996

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Appeals for the Second Circuit, Decided January 26, 1996

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1423, 1905—August Term, 1994

(Argued: May 17, 1995 Decided: January 26, 1996)

Docket Nos. 94-7887, 94-7889

INTERNATIONAL CABLEVISION, INC. d/b/a ADELPHIA CABLE,

Plaintiff-Appellant,

—vs.—

JOHN SYKES AND MARVIN NOEL,

Defendants-Appellees.

Before:

ALTIMARI, MAHONEY, and WALKER,

Circuit Judges.

Plaintiff-appellant International Cablevision, Inc. d/b/a Adelphia Cable appeals from judgments entered against defendants-appellees John Sykes and Marvin Noel in the United States District Court for the Western

District of New York, John T. Curtin, *Judge*, that provided statutory damages to Cablevision against each defendant-appellee pursuant to 47 U.S.C. § 553, but denied relief pursuant to 47 U.S.C. § 605.

Vacated and remanded for the provision of relief pursuant to § 605.

GEOFFRY D.C. BEST, New York, New York (Lorna M. McKenzie, LeBoeuf, Lamb, Greene & MacRae L.L.P., New York, New York, Randall D. Fisher, Athena Jamesson, International Cablevision, Inc. d/b/a Adelphia Cable, Coudersport, Pennsylvania, Daniel J. Lefkowitz, William B. Jung, Law Offices of Daniel J. Lefkowitz, Jericho, New York, of counsel), *for Plaintiff-Appellant*.

RODNEY O. PERSONIOUS, Buffalo, New York (Brown & Kelly, Buffalo New York, of counsel), *for Defendant-Appellee Marvin Noel*.

George R. Blair, Jr., Buffalo, New York (Bouvier & O'Connor, Buffalo, New York, of counsel), *for Defendant-Appellee John Sykes*.

MAHONEY, *Circuit Judge*:

Plaintiff-appellant International Cablevision, Inc. d/b/a Adelphia Cable ("Cablevision") appeals from judgments entered August 12, 1994 against defendants-

appellees John Sykes and Marvin Noel in the United States District Court for the Western District of New York, John T. Curtin, *Judge*, that granted Cablevision's motions for summary judgment pursuant to 47 U.S.C. § 553[1] against both Sykes and Noel, denied Cable-

[1] As pertinent to the issues presented on this appeal, § 553 provides:

(a) Unauthorized interception or receipt or assistance in intercepting or receiving service; "assist in intercepting or receiving" defined

(1) No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

(2) For the purpose of this section, the term "assist in intercepting or receiving" shall include the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).

. . . .

(c) Civil action in district court; injunctions; damages; attorney's fees and costs; regulation by States or franchising authorities

(1) Any person aggrieved by any violation of subsection (a)(1) of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(2) The court may—

(A) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or retrain violations of subsection (a)(1) of this section;

(B) award damages as described in paragraph (3); and

(C) direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(3) (A) Damages awarded by any court under this section shall be computed in accordance with either of the following clauses:

(i) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to

vision's motions for summary judgment and dismissed its claims against Sykes and Noel pursuant to 47 U.S.C. § 605,[2] awarded Cablevision statutory damages of

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prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(ii) the party aggrieved may recover an award of statutory damages for all violations involved in the action, in a sum of not less than $250 or more than $10,000 as the court considers just.

(B) In any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory under subparagraph (A), by an amount of not more than $50,000.

(C) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100.

[2] As pertinent to the issues presented on this appeal, §605 provides:

(a) Practices prohibited

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

. . . .

(footnote continued)

$250 against each defendant-appellee pursuant to § 553(c)(3)(A)(ii), and denied Cablevision's applications for injunctive relief, attorney fees, and costs.

Vacated and remanded for the provision of relief pursuant to § 605.

(e) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

. . . .

(3) (A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of subsection [(e)] of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court-

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C) (i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect com-

Background

This appeal presents for decision the applicability of § 605 to the sale of devices known as "pirate" cable descramblers or "black boxes." The facts pertaining to Cablevision's suit against Sykes are described in a previous opinion by this Court. *See International Cablevision, Inc. v. Sykes*, 997 F.2d 998, 1000-03 (2d Cir. 1993). Those pertaining to the suit against Noel are outlined in the district court opinion from which this appeal is primarily taken. *See International Cablevision, Inc. v. Noel*, 859 F. Supp. 69, 71-72 (W.D.N.Y. 1994). Familiarity with both opinions is assumed.

Cablevision sells cable television programming which it delivers to its customers from the system headend via coaxial ground cable. The headend "has parabolic or other appropriately shaped antennas for receiving satellite-delivered program signals, high-gain directional antennas for receiving distant TV broadcast signals,

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mercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

directional antennas for receiving local signals, machines for playback of taped programming and commercial insertion, and studios for local origination and community access programming." Walter S. Ciciora, *Cable Television in the United States: An Overview* 9 (Cable Television Laboratories, Inc., Louisville, Colorado, revised 2d ed 1995).

Customers purchase a package of channels termed "basic service" from Cablevision for a minimum flat rate, and may purchase additional "premium" channels, such as HBO or Showtime, for a higher fee. Although both basic service and premium channels are transmitted to all subscribers' homes, Cablevision scrambles the signals for premium channels and provides a "descrambler" or "decoder" only to customers paying for premium service. However, a subscriber paying for basic service can gain access to premium channels by purchasing a "pirate" descrambler or "black box" from a source other than Cablevision.

In October 1990, Sykes sold a pirate descrambler for $250 to Sandra Helsel, a private investigator sent to his place of business by Cablevision, who tape recorded her conversation with Sykes. Helsel asked him for "a guarantee or warranty of some kind," and Sykes assured her that: "Any problems at all let me know. . . . Otherwise, like I said I got a thousand of them if I don't have one." Helsel then asked if she could get another one, and Sykes replied: "Yes. I've got 15/20 all the time."

Cablevision instituted a civil action against Sykes alleging violations of §§ 553 and 605 (as well as various provisions of New York law), and moved for summary judgment on its federal claims. Cablevision submitted an affidavit by Helsel and a transcript of the recorded con-

versation with Sykes in support of its motion for summary judgment.

In opposition, Sykes provided an affidavit in which he admitted that he had sold the descrambler to Helsel, but claimed that he had purchased it for approximately $250 at the behest of a special agent of the Federal Bureau of Investigation (the "FBI") with the understanding that the agent would reimburse him for the purchase. When Sykes was told that he would not be reimbursed, he sold it to Helsel for no profit.

FBI Special Agent Glen C. Reukauf provided an affidavit stating that some years earlier, in 1987, Sykes had advised him that certain local individuals had developed a device to descramble an encryption scheme recently adopted by Cablevision, and that Sykes had furnished Reukauf with such a device. Reukauf noted that he had been unaware at the time that Sykes had purchased the descrambler with personal funds (but rather had surmised that it had been lent to Sykes), and asserted that although he had returned the descrambler to Sykes, he had never authorized Sykes to resell it.

In a decision dated February 5, 1992, the district court denied Cablevision's motion for summary judgment, stating that:

> The fact that Mr. Sykes sold the box to Ms. Helsel is not contested, and it was clear from her affidavit that Sykes knew what the device was, what it would do, and that he clearly intended to violate the law. If that was the only evidence before the court, the plaintiff would be entitled to a motion for summary judgment.

> However, there is a dispute as to when the device came into the possession of Mr. Sykes and the manner in which it came into his possession. If in fact he acted in behalf of the government in obtaining the device, there may be a good defense to this action. There must be a trial or hearing to resolve this material fact which is in dispute.

After a one-day bench trial, the district court dismissed the complaint, stating that the effort which Sykes had made to get in touch with the FBI agent to inform him of the piracy and to obtain a descrambler had benefited Cablevision, and that Sykes had "perhaps . . . acted foolishly . . . and sold the device . . . to the investigator," but "there is no evidence here that there was any dealing for gain." The district court further found that Sykes' statements that he had many more descramblers were "part of the sale[s] pitch which he used with the investigator to get rid of the box," and concluded that the box had been "sold with the innocent purpose of . . . recouping . . . losses."

Cablevision appealed, and we vacated and remanded in *Sykes*. Rejecting the district court's determination that no violation of § 553 had occurred, we opined that "§ 553(a)(1) contains no suggestion that its prohibition was meant to extend only to persons who are engaged in the continuing business or repeated conduct of selling [descrambling] devices," and that "there is no suggestion whatever in § 553(a)(1) that in the absence of financial gain there is no violation." 997 F.2d at 1004.

We then addressed § 605, noting that "the applicability of § 605 to the present case was not explored below, apparently because both sides and the district court assumed that both that section and § 553 were applica-

ble," 997 F.2d at 1009, but stating that we considered the applicability of § 605 "unclear," 997 F.2d at 1007. We observed that the question was material because, as a result of 1988 amendments to § 605, the remedies available in a civil suit thereunder were considerably more severe than those available under § 553. 997 F.2d at 1007; *compare* § 553(c)(3), *supra* note 1, with § 605(e)(3)(C), *supra* note 2.

After reviewing the pertinent statutory language and legislative history, we concluded that:

> [I]t may be that Congress intended that to the extent that a device is sold to assist in the theft of signals directly from a satellite, § 605(e)(4) would apply; that if the theft is of signals transmitted by radio waves, § 605(a) would apply; and that when the theft is of a signal transmitted by coaxial cable, § 553(a)(1), and not § 605, would apply.
>
> If this was Congress's intended scheme, it is hardly clear that Sykes's conduct violated § 605. As indicated in Part I above, Cablevision's distribution of cable programming involves several types and stages of communication, including receipt of signals from satellite, transmission via radio, and retransmission over coaxial cable wiring. From the instruction sheet that Sykes gave Helsel, which was introduced at trial, it appears that Sykes's box was designed only for intercepting cable wire transmissions, not for intercepting satellite or radio signals prior to their conversion to a form suitable for transmission over coaxial cable. Thus, it may be that only § 553, not § 605, was applicable to his conduct.

997 F.2d at 1009.

Noting that the § 605 issue had neither been considered by the district court nor briefed on appeal, however, we vacated and remanded for the district court "in the first instance, if Cablevision wishes to pursue its claim under § 605, to determine the applicability of that section." 997 F.2d at 1009. We added that "[i]f [§ 605] was violated and Cablevision was aggrieved thereby, the [district] court should grant Cablevision's request for damages under § 605(e) instead of granting the lesser damages available under § 553." *Id.* Finally, we ruled that an award of attorney fees is mandated for a violation of § 605, but discretionary as to a violation of § 553. *Id.* at 1009-10; *compare* § 553(c)(2)(C), *supra* note 1, *with* § 605(e)(3)(B)(iii), *supra* note 2.

Cablevision had commenced its action against Noel on July 8, 1991. By the time of our remand in *Sykes*, Cablevision's motions for summary judgment and Noel's motion to dismiss Cablevision's claims under § 605 were pending in the *Noel* action. Accordingly, the district court consolidated the cases for joint briefing.

Noel had sold two pirate descramblers that he had obtained from a company in Chicago, Illinois to Ann Crowley and Darleen Lake, investigators for Cablevision, for $300 each in April 1991. Unbeknownst to Noel, the investigators tape recorded their conversion with him during the second sale. During the taped conversation, Noel explained how to connect the descrambler, told the investigators to be careful who they talked to about the unit and to hide it from the cable company, and added that it was "illegal." Noel also told the investigators that "I don't sell that many [descramblers], just once in a while." Crowley and Lake signed a statement which asserted that at the time of the first sale, Noel told

them that he didn't make any money selling descramblers, but "just like[d] to screw the cable company."

Addressing the pending motions in *Noel*, the district court turned first to the issue of Noel's liability under §§ 553 and 605. The court noted that Noel had conceded liability under § 553. 859 F. Supp. at 72. The court then addressed the provisions of § 605(e)(4), *see supra* note 2, and concluded that it was required to ascertain "whether the descramblers [Noel] sold were either (i) 'primarily of assistance in the unauthorized decryption of satellite cable programming,' or (ii) intended for use in any of the various other activities prohibited by 47 U.S.C. § 605(a)." 859 F. Supp. at 72 (quoting § 605(e)(4)); *see also* § 605(e)(3)(A) (establishing civil action for any person aggrieved by a violation of § 605(a) or (e)(4)), *supra* note 2.

The court ruled that the descramblers sold by Noel were not "primarily of assistance in the unauthorized decryption of satellite cable programming" within the meaning of § 605(e)(4) because:

> "Satellite cable programming" is defined in § 605(d) as "video programming which is *transmitted via satellite* and which is primarily *intended for the direct receipt by cable operators for their retransmission* to cable subscribers." 47 U.S.C. § 605(d)(1) (emphasis added). The plain meaning of this language is that the term refers to over-the-air satellite signals *before* their receipt by cable operators. It is clear that the signals must be *intended for receipt* by the operators; however, once they have been received and retransmitted to subscribers through coaxial cable, they no longer fall within the defi-

> nition. *United States v. Norris*, 833 F. Supp. [1392,] 1398-1399 [(N.D. Ind. 1993)].

859 F. Supp. at 77.

The court also concluded that Noel had not violated § 605(a) by selling the two descramblers to Crowley and Lake. The court noted that both § 553 and the provision that ultimately became § 605(e)(4) had been enacted as part of the Cable Communications Policy Act of 1984 (the "1984 Act"), Pub. L. No. 98-549, 98 Stat. 2779, while the existing § 605 was retained without alteration as § 605(a). 859 F. Supp. at 72-73. The court discounted several cases that antedated the enactment of the 1984 Act and had interpreted § 605 as affording protection to television signals transmitted via coaxial cable because:

> First, the statutory language itself fails to establish that § 605(a) prohibits the interception and decryption of television signals transmitted via cable. And second, interpretation of § 605(a) as encompassing the theft of cable-borne signals would render Congress' enactment of § 553 superfluous, and would require an unnecessarily strained reading of the legislative history of §§ 553 and 605(e)(4).

859 F. Supp. at 73.

The court separately addressed each of the first three sentences of § 605(a), set forth *supra* at note 2, in concluding that § 605(a) did not apply to the interception of cable-borne television signals, 859 F. Supp. at 73-75, and also reviewed the legislative history of the 1984 Act as it bears upon the issue, *id.* at 75-76.

Concluding that only § 553 was applicable to Noel's descrambler sales, the court awarded the minimum of $250 damages authorized by § 553(c)(3)(A)(ii) for

Noel's violations, declining to apply the reduction to no less than $100 damages authorized by § 553(c)(3)(C) "where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of [§ 553]." 859 F. Supp. at 77-79. The court denied injunctive relief to Cablevision, *id.* at 79, and did not separately address the issue of attorney fees.

Immediately thereafter, the court issued a brief opinion disposing of Cablevision's claims against Sykes in accordance with the court's prior decision in *Noel. International Cablevision, Inc. v. Sykes*, No. 90-CV-1272C, slip op. (W.D.N.Y. Aug. 11, 1994). Cablevision's claims under § 605 were dismissed, slip op. at 1, statutory damages of $250 pursuant to § 553(c)(3)(A)(ii) were awarded, slip op. at 2, and attorney fees and injunctive relief were denied, *id.* at 2-3.

This consolidated appeal followed.

Discussion

Cablevision contends on appeal that § 605 applies to the sales of descramblers made by Sykes and Noel, and alternatively that the district court abused its discretion with respect to the measure of relief provided to Cablevision pursuant to § 553 against Sykes and Noel. We conclude that (subject to a reservation stated *infra* at note 5) Sykes and Noel violated § 605, and accordingly that we must remand for the imposition of "damages under § 605(e) instead of . . . the lesser damages available under § 553," *Sykes*, 997 F.2d at 1009, as well as a mandatory award of attorney fees pursuant to § 605, *id.* at 1009-10. Accordingly, we do not address the issue of damages under § 553.

Our analysis begins with the following definitions from the Communications Act of 1934, Pub. L. No. 416, 418 Stat. 1064, 1065 (the "1934 Act"), codified at 47 U.S.C. § 153:

> For the purposes of this chapter, unless the context otherwise requires—
>
> (a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.
>
> (b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

As will appear, the pivotal question on this appeal is whether the descramblers sold by Sykes and Noel were intended to be used to "receive . . . any . . . communication by radio" within the meaning of the third sentence of § 605(a), an inquiry that requires examination of the definition of "communication by radio" in § 153(b). Some preliminary explication is required, however, in order to isolate this central issue for resolution.

Section 605(e)(3)(A) provides a civil action to "[a]ny person aggrieved by any violation of [§ 605(a)] or

[§ 605(e)(4)]." Section 605(e)(4) imposes criminal liability upon "[a]ny person who . . . distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by [§ 605(a)]." "Satellite cable programming" is defined by § 605(d)(1) to mean "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." *See supra* note 2.

The first sentence of § 605(a) prohibits persons "receiving, assisting in receiving, transmitting, or assisting in transmitting . . . any interstate or foreign communication by wire or radio" from divulging or publishing the contents of that communication except in specified, authorized ways. The second sentence prohibits any "person not being authorized by the sender" from "intercept[ing] any radio communication and divulg[ing] . . . [its] contents . . . to any person." The third sentence prohibits any "person not being entitled thereto [from] receiv[ing] or assist[ing] in receiving any interstate or foreign communication by radio and us[ing] such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto." *See supra* note 2.

Section 605 was initially enacted as § 605 of the Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064, 1103. As originally enacted, the first and third sentences of present § 605(a) made reference to "communication by wire or radio," while the second sentence referred to "any communication." In connection with passage of the Omnibus Crime Control and Safe Streets Act of 1968,

Pub. L. No. 90-351, 82 Stat. 197, tit. III (Wiretapping and Electronic Surveillance), codified at 18 U.S.C. § 2510 *et seq.* (the "1968 Act"), however, Congress deleted the reference to communication "by wire" in the third sentence of present § 605(a), and changed the phrase "any communication" to "any radio communication" in the second sentence. In addition, the designations (1) through (6) were added to the existing provisions of the first sentence, as well as the introductory clause: "Except as authorized by chapter 119, Title 18." Minor editorial changes to § 605 were also made at that time. *See* Pub. L. No. 90-351, § 803, 82 Stat. 223.

Although the 1968 amendments might have been read to remove the receipt or interception of cable-borne television signals from the purview of the second and third sentences of § 605 (now § 605(a)), the courts did not construe those provisions in this manner when the issue was presented to them. Rather, the case law was to the contrary.

The first such case, *Porter County Cable Co. v. Moyer*, 624 F. Supp. 1 (N.D. Ind. 1983), cited the second and third sentences of § 605(a) as applicable to the sale of electronic descramblers for use in intercepting premium cable television services. *See* 624 F. Supp. at 3. The case was decided on an unopposed motion for summary judgment. *See id.* at 2. It relied upon two prior cases that dealt with the interception of over-the-air, rather than cable-borne, subscription television services. *See id.* at 3.

Cox Cable Cleveland Area, Inc. v. King, 582 F. Supp. 376 (N.D. Ohio 1983), next made such a ruling, citing cases that dealt with the unauthorized interception of

over-the-air subscription television, *id.* at 380, and stating that "[s]ection 605 prohibits the divulgement or publication of *wire communications* which are not intended for the general public," *id.* (emphasis added). As previously noted, as a result of the amendments made to § 605(a) by the 1968 Act, only the first sentence of § 605(a) makes any reference to "wire" communications.

Ciminelli v. Cablevision, 583 F. Supp. 158 (E.D.N.Y. 1984), incorporated, appended, and relied upon an immediately prior ruling by the same court in *Cablevision v. Annasonic Electronic Supply*, No. CV-83-5159 (E.D.N.Y. Feb. 10, 1984), to reject the argument that "[s]ection 605 does not apply to the interception of wire transmissions or communications." *See* 583 F. Supp. at 160-61. *Ciminelli* also cited in support of its ruling *Porter*, *Cox Cable*, and *National Subscription Television v. S & H TV*, 644 F.2d 820, 826-27 (9th Cir. 1981), a case dealing with the interception of over-the-air subscription television. 583 F. Supp. at 161.

Finally, *Annasonic* stated three rationales for concluding that § 605 applies to the interception of cable-borne, as well as over-the-air, pay television. First, "[t]he system of coaxial cable used to facilitate final delivery of the signal to subscriber homes, does not change the nature of the stolen transmission itself." 583 F. Supp. at 164. Second, the court pointed to the first sentence of § 605(a) as prohibiting such interceptions. *Id.* Third, the court disparaged the likelihood that the 1986 Act would have excepted cable-borne television from the proscription of § 605(a) without providing any substitute proscription under the 1968 Act.[3]

[3] A provision of the 1968 Act, 18 U.S.C. § 2520, provides a civil remedy to any person whose wire communication is intercepted in violation of the 1968 Act, but § 2520 had been construed in *Cox Cable* as pro-

In *Noel*, the district court rejected these cases and their interpretation of § 605(a). It regarded the first sentence of that provision as "intended to regulate the conduct of *communications personnel - i.e.*, those legitimately involved in transmitting or receiving radio or wire communications - rather than to address the problem of unauthorized interception or reception of communications." *Noel*, 859 F. Supp. at 75 (citing Sen. Rep. No. 1097, 98th Cong., 2d Sess. ___, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2197; *Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 540 (5th Cir. 1987)). It deemed the 1968 amendments to the second and third sentences of § 605(a) to have removed wire communications from their purview, and viewed the contrary judicial interpretations as having " 'stretched the language of § 605 to apply to the advanced technologies of the 1980s.' " *Id.* (quoting *United States v. Norris*, 833 F. Supp. 1392, 1400 (N.D. Ind. 1993), *aff'd on other grounds*, 34 F. 3d 530 (7th Cir. 1994)).

This is certainly a plausible reading of the impact of the 1968 Act upon § 605. We note in this regard the following statement from the legislative history of the 1968 Act: "This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed new chapter 119 of title 18, United States Code." Sen. R. No. 1097 at ___, *reprinted in* 1968 U.S.C.C.A.N. 2196.

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viding no remedy to the operator of a cable television system against a purveyor of descrambling devices for interception of that system because of applicable definitional provisions of the 1968 Act. *See* 582 F. Supp. at 381-83.

Nonetheless, the pre-1984 decisions provide another plausible interpretation of at least the third sentence of § 605(a).[4] *See Sykes*, 997 F.2d at 1007 (deeming third sentence of § 605(a) the "pertinent" provision). The continued transmission of radio signals via cable after their receipt at the headend of a cable television system can be regarded as the "receipt, forwarding, and delivery of [radio] communications . . . incidental to [the transmission]" of the pictures and sounds transmitted by those communications within the meaning of § 153(b).[5] *See Annasonic*, 583 F. Supp. at 164 ("The system of coaxial cable used to facilitate final delivery of the signal to subscriber homes, does not change the nature of the stolen transmission itself."). This interpretation may be deemed to have been adopted by Congress when it reenacted § 605(a) without change (except for labelling it as subsection (a) of an expanded § 605) in the course of adopting the 1984 Act. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (collecting cases); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (same); *Trichilo v. Secretary of Health & Human Servs.*, 823 F.2d 702, 706

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[4] The first sentence of § 605(a) is probably directed at communications personnel, as the district court indicated in *Noel*. *See* 859 F. Supp. at 75. The second sentence requires not only the interception of a "radio communication," but also its publication to a third party; descramblers are not ordinarily intended to facilitate *both* interception *and* publication to a third party.

[5] As noted at the outset of this opinion, not all programming distributed from the headend of a cable television system originates as a radio communication. Thus, if it could be proved in a particular case that the interception at issue, or the distribution of a descrambler for the purpose of such interception, would not involve any radio-originated communications, only § 553, and not § 605, would be violated in that case.

(2d Cir. 1987) (same); 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.12, at 62 (1992 revision) (same).

The applicability of this canon of construction is attenuated in this case, however, because the pertinent pre-1984 cases did not closely examine the language of § 605(a) as amended by the 1968 Act, and we regard as dubious the applicability of the first two sentences of § 605(a) to the sale of descramblers for cable-borne television signals. *See supra* note 4. The canon nonetheless provides some support for construing § 605(a) in accordance with the pre-1984 cases, and that support is strongly fortified by the legislative history of the 1984 Act.

As previously noted, § 553 was enacted as part of the 1984 Act, and existing § 605 was retained without alteration as § 605(a). H.R. Rep. No. 934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 4655, contains the following statement in its section-by-section analysis of § 553:

> Existing section 605 of the Communications Act of 1934 includes a prohibition against the unauthorized reception of communications services. *Nothing in [§ 553] is intended to affect the applicability of existing Section 605 to theft of cable service, or any other remedies available under existing law for theft of service.*
>
> Section [553] sets forth a liability provision specifically applicable to theft of services offered over a cable system, while also providing specific criminal penalties and civil remedies for violations of the section. [Section 553(a)(1)] prohibits any person from intercepting or receiving, or from assisting

> in the interception or reception of, any service offered over a cable system, unless the cable operator specifically authorizes the reception, or it is otherwise specifically authorized by law.
>
> The Committee intends the phrase "service offered over a cable system" to limit the applicability of [§ 553] to theft of a service from the point at which it is actually being distributed over a cable system. Thus, situations arising with respect to the reception of services which are transmitted over-the-air (or through another technology), but which are also distributed over a cable system, *continue to be subject to resolution under section 605 to the extent reception or interception occurs prior to or not in connection with, distribution of the service over a cable system.* The Committee further intends that the term "any communications service" include, for example, audio, video, textual, data, or other service offered over a cable system, including any material transmitted to or from a subscriber over a cable system that has interactive capability.

H.R. Rep. No. 934 at 83, *reprinted in* 1984 U.S.C.C.A.N. 4720 (emphasis added).

Although the issue is not entirely free from doubt, the more likely reading of this legislative history is that in view of the uniform prior judicial interpretation of § 605 as applicable to the theft of cable service, the first emphasized passage in the above quotation was intended to make clear that § 605 would continue to be so applicable. Although the second emphasized passage might be read to undercut this interpretation of the first passage, it is in our view more plausible to consider the second passage as establishing § 605's exclusive juris-

diction over the transmission of a television signal by radio prior to the transmission of that same signal by cable, rather than as barring the application of § 605 to the subsequent cable transmission of the signal.

Further, legislative history subsequent to the House report strongly confirms the latter interpretation. On the day that the 1984 Act was adopted by both houses of Congress, Senator Robert W. Packwood, chairman of the Senate Committee on Commerce, Science, and Transportation (the committee responsible for the legislation), delivered a statement that adopted "the explanation of [the 1984 Act] contained in House Report 98-934, . . . with the modifications that follow." 130 Cong. Rec. S14285 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), *reprinted in* 1984 U.S.C.C.A.N. 4738. Senator Packwood's statement included the following:

> H.R. 4103 as reported by Committee recodifies without modification section 605 to the Communications Act of 1934 as new section [605](a). *In amending existing section 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications.* Over the years federal courts, consistent with congressional intent, have recognized that section 605 provided broad protection against the unauthorized interception of various forms of radio communications. *It is the Committee's intention* that the amendment preserve these broad protections; *that all acts which presently constitute a violation of present section 605 shall continue to be unlawful under that section as amended and redesignated by H.R. 4103.*

> Section 605 not only prohibits unauthorized interception of traditional radio communications, but also communications transmitted by means of new technologies. For example, existing section 605 provides protection against the unauthorized reception of subscription television (STV), multipoint distribution services (MDS), and satellite communications. This amendment made by section 5 of the bill is *intended to preserve this broad reach of existing section 605 and to make clear that all communications covered under section 605 will continue to be protected under new section [605](a).*
>
> Moreover, existing section 605 is not limited to holding liable only those who, without authorization, actually receive a particular communication. Those who "assist" (including sellers and manufacturers) in receiving such communications are similarly liable under section 605, and *it is intended that this liability also remain undisturbed by this amendment.*

130 Cong. Rec. S_____, *reprinted in* 1984 U.S.C.C.A.N. 4746 (emphasis added). That same day, the Senate concurred in the House amendments with amendments, and the House concurred in the Senate amendments. *See* 98 Stat. 2806.

In light of this legislative history and the uniform pre-1984 judicial interpretation of § 605 as applicable to the distribution of descramblers for the interception of cable television, we conclude that § 605 continues to apply to such distribution, and therefore to the conduct of Sykes and Noel that is at issue on this appeal. We note that this result does not lead to a complete overlap between the coverage of §§ 605 and 553. Section 605 applies to a

considerable body of radio transmissions to which § 553 is inapplicable, while § 553 applies to any transmissions via cable, whether or not they originate as radio transmissions. *See supra* note 5; *see also* H.R. Rep. No. 938 at 83, *reprinted in* 1984 U.S.C.C.A.N. 4720 ("[T]he term 'any communications service' [in § 553(a)(1)] include[s] . . . audio, video, textual, data, or other service offered over a cable system, including any material transmitted to or from a subscriber over a cable system that has interactive capability."). Although the resulting interplay and overlap between §§ 553 and 605 may not demonstrate "a convenient and inviting sense of order," *Cablevision Sys. Corp. v. Muneyyirci*, 876 F. Supp. 415, 425 (E.D.N.Y. 1994),[6] it is for Congress, not the courts, to address any perceived resulting disorder. *See id.*

In our view, finally, the more severe statutory penalties provided by § 605(e)(3)(C)(i)(II), *see supra* note 2, for violations of § 605(e)(4) apply in this case. A violation of § 605(e)(4) occurs upon the distribution of a descrambler with knowledge (or reason to know) "that

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[6] We note that *Muneyyirci*, 876 F. Supp. at 420-425, agrees with our analysis of the interplay between §§ 553 and 605, as does *General Instrument Corp. v. Lake Sylvan Sales, Inc.*, No. CIV. A. 93-3856, 1993 WL 496588, at *2-4 (E.D. Pa. Nov. 30, 1993), while *Norris*, 833 F. Supp. at 1397-1401, 1403-04 (on reconsideration), does not. The Seventh Circuit did not address the issue in affirming *Norris*. *See* 34 F.3d at 532-33. A number of post-1984 cases have affirmed the application of § 605 to piracy of cable-borne television signals without extended consideration of the issues addressed in this appeal, *Sykes*, *Muneyyirci*, *General Instrument Corp.*, *Noel*, and *Norris*. *See, e.g., ON/TV of Chicago v. Julien*, 763 F.2d 839, 844 (7th Cir. 1985); *Time Warner Cable v. Freedom Elecs., Inc.*, 897 F. Supp. 1454, 1459 (S.D. Fla. 1995); *Oceanic Cablevision, Inc. v. M.D. Elecs.*, 771 F. Supp. 1019, 1025 (D. Neb. 1991); *Shenango Cable TV, Inc. v. Tandy Corp.*, 631 F. Supp. 835, 837 (W.D. Pa. 1986); *Cablevision Sys. Corp. v. DePalma*, No. CV-87-3528 (JLC), 1989 WL 8165, at *3 (E.D.N.Y. Jan. 17, 1989); *Cablevision Sys. Dev. Co. v. Cohen*, No. 84 CV 1155 (ERK), slip op. at 7 n.1 (E.D.N.Y. Apr. 21, 1988).

the [descrambler] is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by [§ 605(a)]." Thus, the act of distribution for either of the above purposes incurs the heavier penalties provided by § 605(e)(3)(C)(i)(II), while the subsequent act of interception (or assistance in interception) is a violation of the third sentence of § 605(a) and incurs the lesser penalties provided by § 605(e)(3)(C)(i)(II).

Conclusion

The judgment of the district court is vacated and the case is remanded for the imposition of statutory damages and mandatory costs, including attorney fees, in accordance with § 605(e)(3)(C)(i) and (e)(3)(B)(iii). *See Sykes*, 997 F.2d at 1009-10. Appeal costs to Cablevision.

Decision and Order of the United States District Court for the Western District of New York, Dated August 1, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

91-CV-0449C

INTERNATIONAL CABLEVISION, INC.
d/b/a ADELPHIA CABLE,

Plaintiff,

-vs-

MARVIN NOEL,

Defendant.

APPEARANCES:

DANIEL J. LEFKOWITZ, ESQ., Jericho, New York for Plaintiff.

BROWN & KELLY (RODNEY O. PERSONIUS, ESQ., of Counsel), Buffalo, New York for Defendant.

Plaintiff International Cablevision Inc., d/b/a Adelphia Cable ("Cablevision"), brought this action against defendant Marvin Noel seeking damages and injunctive relief, claiming that Noel sold electronic devices designed to permit unauthorized interception and decoding of Cablevision's cable television programming signal, in violation of 47 U.S.C. §§553(a)(1) and 605(e)(4).[1]

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[1] Any person aggrieved by a violation of §553(a)(1) or §605(e)(4) may bring a civil action in a United States district court under 47 U.S.C. §553(c)(1) or §605(e)(3)(A).

Cablevision has moved for summary judgment. Noel concedes the §553 violation; however, he has moved to dismiss the §605 claim.

After the parties' original briefs were filed, the Second Circuit decided *International Cablevision, Inc. v. Sykes,* 997 F.2d 998 (2d Cir. 1993). In that decision, the Second Circuit discussed the relationship between §§553 and 605 in some detail, and expressed reservations about the applicability of §605 in cases which like the present one, involve the theft of television signals transmitted by coaxial cable. *Id.* at 1007-1009. It did not, however, rule on the issue. On July 14, 1993, this court ordered the parties in the present case to file additional briefs on the applicability of §605 in the light of *Sykes*. Both parties have done so.

FACTUAL BACKGROUND

Cablevision provides cable television programming to residents of Erie and Niagara Counties through franchises awarded by various villages, towns and municipal governments. Pursuant to the franchise agreements, the company extends its system to reach each person requesting service. Its programming includes "basic cable service" and "premium" channels. Basic service is a package of channels a subscriber receives for a minimum flat rate. Premium programming, which includes channels such as Pay-per-View, Cinemax, HBO, and Showtime, is provided for a higher fee.

Basic service and premium signals are transmitted simultaneously to subscribers' homes via a coaxial ground cable. A device known as a "converter" converts the multiple signals into a form that can be viewed through a subscriber's television set. To prevent subscribers from receiving cable services for which they

have not paid, Cablevision scrambles the signals for premium channels. These signals must be descrambled by the use of device known as a "descrambler" or "decoder" which is either attached to or incorporated into the subscriber's converter. Converter/decoder units are provided to subscribers as part of the monthly charge for cable service. In this way, Cablevision can determine which services each subscriber receives. It is the primary method by which the company prevents subscribers from gaining access to programming for which they have not paid.

Cablevision's contracts with its subscribers forbid unauthorized tampering with its equipment. Nevertheless, it is possible for a subscriber to remove a converter/decoder unit and replace it with one capable of decoding all of the company's coded programming. Thus, a subscriber paying only for basic service may gain access to premium programming by installing a unit from a source other than Cablevision.

On April 9, 1991, Marvin Noel sold a Scientific Atlanta descrambler that he had obtained from a company in Chicago, Illinois, to Ann Crowley and Darleen Lake, investigators for Cablevision. He explained to the investigators how to attach the unit to their existing cable and television connections, and stated that so long as they paid for Cablevision's basic service, they would be able to receive premium programming without having to pay for it. Cablevision tested the unit, and found that it could indeed descramble premium programming on a television receiving only the company's basic service.

Noel sold a second Scientific Atlanta descrambler to Crowley and Lake on April 18, 1991. Unbeknownst to Noel, the investigators made a tape recording of the

conversation that took place at that time. During the conversation, Noel again explained how to connect the descrambler, and told the investigators to be careful about who they talked to about the unit, to hide it from the cable company, and that it was "illegal."

DISCUSSION

1. *Defendant's Liability under §§553 and 605*

Cablevision contends that by selling descramblers intended for use in the unauthorized reception of its premium programming, Noel violated both 47 U.S.C. §553(a) and 47 U.S.C. §605(e)(4). Noel concedes that he violated §553, which provides that:

> (1) No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.
>
> (2) For the purpose of this section, the term "assist in intercepting or receiving" shall include the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).

47 U.S.C. §553(a). He maintains, however, that his conduct was not covered by §605(e)(4). The question of liability under §605(e)(4) is material, because the Second Circuit has indicated that if §605(e) is applicable in cases such as this one, district courts should award damages under that section rather than the lesser damages available under §553. *International Cablevision, Inc. v. Sykes,* 997 F.2d at 1009. Further, where a plaintiff prevails on a §605(e) claim, the court *must* award

reasonable attorneys' fees, whereas if it is shown that the defendant violated only §553, the court may, but is not required to, award such fees. *Id.* at 1009-1010; 47 U.S.C. §§553(c)(2)(C) and 605(e)(3)(B)(iii).

Section 605(e)(4) establishes that it is a violation for any person to sell or distribute:

> any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a) of this section.

47 U.S.C. §605(e)(4). Section 605(a), in turn, provides in pertinent part that:

> no person receiving, assisting in receiving, transmitting or assisting in transmitting, any interstate or foreign communication by wire or by radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee ... No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 U.S.C. §605(a). Thus, in order to determine whether Noel violated §605(e)(4), I must decide whether the descramblers he sold were either (i) "primarily of assistance in the unauthorized decryption of satellite

cable programming," or (ii) intended for use in any of the various other activities prohibited by 47 U.S.C. §605(a). This requires interpretation of the language of §§605(e)(4) and 605(a) in the context of their legislative history, and of the legislative history and enactment of §553.

Congress enacted both §553 and the provision that ultimately became §605(e)(4) as part of the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779 *et seq.* ("the Cable Act"), which amended the Communications Act of 1934 ("the Communications Act"), 47 U.S.C. §151 *et seq.* Section 553 was intended to deal specifically with the problem of " 'theft of cable service,' including 'gaining access to premium movie and sports channels without paying for the receipt of those services.' " *International Cablevision v. Sykes,* 997 F.2d at 1003 (*quoting* H.R. Rep. No. 934, 98th Cong., 2d Sess. 83 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News ("U.S.C.C.A.N.") 4655, 4720). The legislative history makes it clear that §553(a)(2) was "primarily aimed at preventing the manufacture and distribution of so-called 'black boxes' and other unauthorized converters which permit reception of cable service without paying for the service." H.R. Rep. No. 934, at 84, *reprinted in* 1984 U.S.C.C.A.N. at 4721. Thus, §553(a) was plainly intended to encompass the kind of conduct engaged in by Noel. *International Cablevision, Inc. v. Sykes,* 997 F.2d at 1000-1005; *United States v. Norris,* 833 F. Supp. 1392, 1393-1394, 1398 (N.D.Ind. 1993).

At the same time as providing for the protection of services offered over a cable system in §533, the Cable Act made substantial amendments to §605 of the Communications Act, 47 U.S.C. §605. Pub.L. No. 98-549, §5, 98 Stat. at 2802-2803. The existing §605 was retained without alteration as §605(a), and four new subsections,

designated as subsections (b)-(e), were added. *Id.* The new provisions were intended to address:

> the growing practice of individuals taking down satellite delivered programming for private, home viewing by means of privately owned backyard earth stations, as well as the increasing need to adopt stronger penalties and remedies for the unauthorized interception of signals prohibited under section 605.

130 Cong. Rec. S. 14,286, October 11, 1984 (Statement of Senator Packwood), *reprinted in* 1984 U.S.C.C.A.N. at 4745. Subsection (d) established criminal sanctions and civil penalties for violations of §605(a), and provided an explicit right of action for any person aggrieved by a violation of that section. Subsection d(4) stated that:

> [t]he importation, manufacture, sale or distribution of equipment by any person with the intent of its use to assist in any activity prohibited by subsection (a) shall be subject to penalties and remedies under this subsection to the same extent and in the same manner as a person who has engaged in such prohibited activity.

Pub.L. 98-549, §5(d)(4), 98 Stat. at 2903. Subsection (d) was redesignated as subsection (e), and the language of the former subsection (d)(4) replaced with the current language of subsection (e)(4), in 1988. Pub.L. 100-626, 102 Stat. 3211 (1988); Pub.L. 100-667, §205(12) (1988), 102 Stat. at 3960.

Prior to passage of the Cable Act in 1984, several courts had interpreted §605 as affording protection to television services transmitted via coaxial cable. *Ciminelli v. Cablevision*, 583 F. Supp. 158, 161 (E.D.N.Y. 1984); *Cablevision v. Annasonic Electronic Supply, et al.*, No. CV-83-5159 (E.D.N.Y. February 10, 1984) (Altimari, J.) (decision not published, but appended, in part to

Ciminelli v. Cablevision, 583 F. Supp. at 163-164); *Cox Cable Cleveland Area, Inc. v. King,* 582 F. Supp. 376, 380 (N.D. Ohio 1983); *Porter County Cable Co., Inc. v. Moyer,* 624 F.Supp. 1, 2-3 (N.D.Ind. 1983). Cablevision contends that these cases were decided correctly, and that enactment of the Cable Act did nothing to affect the applicability of the former §605, which was retained unaltered as §605(a), to theft of cable services. I disagree, for two reasons. First, the statutory language itself fails to establish that §605(a) prohibits the interception nad decryption of television signals transmitted via cable. And second, interpretation of §605(a) as encompassing the theft of cable-borne signals would render Congress' enactment of §553 superfluous, and would require an unnecessarily strained reading of the legislative history of §§553 and 605(e)(4).

Each of the first three sentences of §605(a) had, prior to passage of the Cable Act, been relied upon by courts in finding that §605 afforded protection to cable-borne television signals. Not one of these sentences, however, is obviously applicable. Cablevision maintains that the relevant language is contained in the second and third sentences, which provide that:

> [n]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 U.S.C. §605(a). Plainly, these provisions should only be held applicable if the terms "radio communication" and "communication by radio" can properly be interpreted to include cable-borne signals. The Communications Act, however, clearly distinguishes between "wire communication" or "communication by wire," which includes the transmission of signals "by aid of wire, cable, or other like connection between the points of origin and reception of such transmission," and "radio communication" or "communication by radio," which means the transmission of signals by radio. 47 U.S.C. §153(a),(b). Cablevision's cable-borne signals certainly fall within the definition of "wire communications," but are not obviously encompassed by the term "radio communications." I recognize that the term "radio communication" includes "services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §153(b). But Cablevision does not argue, and there is no reason to hold, that its cable-borne signals may be regarded as *incidental to* radio transmissions.

All of the pre-Cable Act cases holding that cable-borne television signals were protected under §605 relied, at least in part, on the language of the second and third sentences of that section, and thus on the characterization of the signals as "radio communications." *Ciminelli v. Cablevision*, 583 F. Supp. at 161; *Cablevision v. Annasonic Electronic Supply, et al.*, 583 F. Supp. at 163-164; *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. at 379-380; *Porter County Cable Co., Inc. v. Moyer*, 624 F.Supp. at 3.[1] Cablevision

[1] In *Porter County Cable Co., Inc. v. Moyer*, the court quoted the language of §605 incorrectly, including the words "wire or" before the word "radio" in the third sentence. 624 F. Supp. at 3.

maintains that this reliance was properly based on a recognition that there is no distinction between cable programming signals transmitted first "over-the-air" and then, after receipt by cable operators, "over-the-wire" to subscribers. In support of its position, it cites the following passage from *Cablevision v. Annasonic Electronic Supply, et al.*:

> The premium services offered by plaintiffs, such as HBO, are transmitted by interstate radio communications and then relayed to subscribers by means of coaxial cable. While the theft of services by way of unauthorized descramblers occurs at the subscriber's home and not at the cable headend, the theft is nevertheless of an interstate radio transmission.

583 F. Supp. at 163-164. Insofar as this analysis completely disregards the clear distinction made in 47 U.S.C. §153 between radio and wire communications, I respectfully disagree with it.[3]

The second and third sentences of §605 were amended in 1968, by insertion of the word "radio" before "communication" in the second sentence, and by elimination of the words "wire or" preceding the word "radio" in the third sentence. Pub.L. 90-351, §803 (1968).

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[3] Cablevision also cites *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), in support of the proposition that programming signals which cable television operators first receive at a satellite dish and then retransmit over coaxial cable to subscribers represent a "stream of communication [that] is essentially uninterrupted and properly indivisible." *Id.* at 169. The Supreme Court's observation was made in the context of a determination that community antenna television (CATV) systems, which "receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers," *Id.* at 161, are engaged in interstate communication. The Court did not in any way suggest that wire-borne and radio signals are indistinguishable for regulatory purposes.

These amendments make it clear that Congress did not intend the provisions to apply, after 1968, to wire communications. *See Dunn v. Blue Ridge Telephone Co.*, 868 F.2d 1578, 1581, n. 12, *reh'g granted*, 888 F.2d 731, *remanded for dismissal on grounds that the case had settled*, 888 F.2d 731, 732 (11th Cir. 1989). The changes were enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, at the same time that Congress enacted the Wiretap Act, 18 U.S.C. §2510 *et seq.*, which was intended to govern, from that time, the interception of wire and oral communications. *See* S. Rep. No. 1097 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153, 2196-2197 (1968). In *Cablevision v. Annasonic Electronic Supply, et al.*, Judge Altimari indicated that he had reviewed the legislative history of the Wiretap Act, and "found no intent within that statute to cover the area of theft of cable television services." 583 F. Supp. at 164. He concluded that he should therfore construe §605 as protecting such services. Again, I cannot concur. I have been unable to find any indication in the legislative history of the 1968 Act that Congress gave any consideration to the question of the theft of cable television signals, or that it intended such signals to be protected from unauthorized interception under the amended §605, at that time.

Unlike the second and third sentences of §605(a), the first sentence refers to both radio and wire communications. It provides, in pertinent part, that:

> no person receiving, assisting in receiving, transmitting or assisting in transmitting, any interstate or foreign communication by wire or by radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee . . .

47 U.S.C. §605(a). The explicit reference to communications "by wire or by radio" makes it even clearer that while the first sentence of §605(a) was intended to protect wire-borne signals, the second and third sentences were not.

I do not interpret the first sentence of §605(a) as affording protection against the unauthorized interception or receipt of wire, or indeed of any, communications. Unlike the second and third sentences, it makes no reference to such activity. Interpreting it as protecting against the unauthorized interception or receipt of *wire* communications would be contrary to Congress' intent in amending the second and third sentences of §605 in 1968. *See supra.* Similarly, interpreting it as protecting against the unauthorized interception or receipt of *radio* communications would render the second and third sentences superfluous. Furthermore, the legislative history of the 1968 amendments makes it clear that the first sentence of §605 was intended to regulate the conduct of *communications personnel—i.e.*, those legitimately involved in transmitting or receiving radio or wire communications—rather than to address the problem of unauthorized interception or reception of communications. S. Rep. No. 1097, *reprinted in* 1968 U.S.C.C.A.N. at 2197; *see Edwards v. State Farm Insurance Co.*, 833 F.2d 535, 540 (5th Cir. 1987). Thus, to the extent that the courts in *Ciminelli v. Cablevision*, 583 F. Supp. at 161, *Cablevision v. Annasonic Electronic Supply, et al.*, 583 F. Supp. at 164, and *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. at 380, relied upon the first sentence of §605 in holding that §605 affords protection against the unauthorized descrambling of cable-borne television signals, I must again respectfully disagree with their conclusions.

When the pre-Cable Act cases were decided, §553 had not yet been enacted, and there may have been no federal statute besides §605 that arguably covered the theft of cable-borne television signals by the use of descramblers. *United States v. Norris*, 833 F. Supp. at 1400; *Cablevision v. Annasonic Electronic Supply, et al.*, 583 F. Supp. at 164. The courts "stretched the language of §605 to apply to the advanced technologies of the 1980s." *United States v. Norris*, 883 F. Supp. at 1400 (citing *Air Capital Cablevision, Inc. v. Starlink Communications, Inc.*, 601 F. Supp. 1568, 1570-1571 (D.Kan. 1985)). In enacting §553 as part of the Cable Act, Congress addressed, for the first time, the problem of unauthorized interception and receipt of cable-borne television signals. As I have already noted, the legislative history makes it quite plain that §553 was aimed specifically at affording cable operators protection from such conduct. Cablevision maintains, nevertheless, that the courts should continue to construe §605(a) as being applicable in cases such as the present one. It is quite clear that Cablevision is wrong.

Cablevision relies on two passages from the legislative history of the Cable Act. It cites, first of all, the following statement by Rep. Wirth:

> In amending existing section 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications. Over the years federal courts, consistent with Congressional intent, have recognized that section 605 provided broad protection against the unauthorized interception of various forms of radio communications. It is the Committee's intention to preserve these broad protections; that all acts which presently constitute a violation of present section 605 will continue to be unlawful under that section as amended.
>
> * * *

> Section 605 not only prohibits unauthorized interception of traditional radio communications, but also communications transmitted by way of new technologies . . . This amendment made by section 5 of the bill is intended to preserve this broad reach of existing section 605 and to make clear that all communications covered under section 605 will continue to be protected under new section [605(a)].

130 Cong. Rec. H. 10,435, 10,439 (daily ed. October 1, 1984). Cablevision fails to recognize that this statement refers only to the intended effect of the proposed amendment of §605 (*i.e.* the addition of subsections (b)-(e)), and not to the intended effect of the proposed enactment of §553, on the reach of §605.

Cablevision also relies on the following passage from the House Report:

> Existing section 605 of the Communications Act of 1934 includes a prohibition against the unauthorized reception of communications services. Nothing in [proposed §553] is intended to affect the applicability of existing Section 605 to theft of cable service, or any other remedies available under existing law for theft of service.

H.R. Rep. 934, at 83, *reprinted in* 1984 U.S.C.C.A.N. at 4720. This passage, when read in isolation, does seem to suggest that Congress believed that former §605 had properly applied to the theft of cable-borne signals, and that it should continue to do so after the enactment of §553. However, the House Report continued:

> [Proposed §553] sets forth a liability provision specifically applicable to theft of cable services offered over a cable system . . .
>
> The Committee intends the phrase "service offered over a cable system" to limit the applicability of this section to theft of a service form the point at which it is actually being distributed

> over a cable system. Thus, situations arising with respect to the reception of services which are transmitted over-the-air (or through another technology), but which are also distributed over a cable system, continue to be subject to resolution under section 605 *to the extent reception or interception occurs prior to or not in connection with, distribution of the service over a cable system.*

H.R. Rep. 934, at 83, *reprinted in* 1984 U.S.C.C.A.N. at 4720 (emphasis added). This language provides strong support for the view that Congress meant that while §605 would continue to govern the theft or air-borne signals intended for redistribution via cable, §553, and *not* §605. would govern the theft of cable-borne signals. *International Cablevision, Inc. v. Sykes,* 997 F.2d at 1008; *United States v. Norris,* 833 F. Supp. at 1400-1401, 1403-1404. Indeed, it would have been superfluous for Congress to enact §553 if it intended that the theft of cable-borne signals was also to be governed by the amended version of §605. *See United States v. Norris,* 883 F. Supp. at 1400-1401.[4]

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[4] In *Sykes,* the Second Circuit reviewed the similarities and differences in the civil enforcement provisions of §§553 and 605. *International Cablevision, Inc. v. Sykes,* 997 F.2d at 1007-1008. In so doing, it observed:

> Both §553 and §605(e) were adopted as part of the [Cable] Act. In that Act, except for specifying that the statutory damages award was for "all violations" of §553 as contrasted with "each violation" of §605 ... the civil remedy provisions were substantially identical. The monetary levels provided under both sections were the same. If §553 had been intended to reach only conduct that was also prohibited by §605, Congress might well not have set out the civil enforcement mechanisms separately. Further, in 1988, Congress substantially increased the penalty levels provided by §605(e), *see* Pub.L. No. 100-667, §205(9), 102 Stat. 3935, 3959-60 (1988); thus, if §605 reaches all conduct prohibited by §553, it is improbable that an aggrieved person would ever seek damages under §553 rather than §605.

Id. at 1008.

In light of the above, I conclude that the unauthorized interception and descrambling of cable-borne television signals represents a violation of §553(a)(1), but not of §605(a). Thus, the sale of descramblers intended for use in the decoding of cable-borne television signals does not represent a violation of that part of §605(e)(4) that prohibits the sale of any device or equipment, "knowing or having reason to know that [the device or equipment] . . . is intended for any . . . activity prohibited by [§605(a)]." 47 U.S.C. §605(e)(4).

Cablevision contends that Noel violated §605(e)(4) not only because the descramblers he sold were intended for use in an activity prohibited by §605(a), but also because they fall under the definition of equipment "primarily of assistance in the unauthroized decryption of satellite cable programming." 47 U.S.C. §605(e)(4). This argument in untenable. "Satellite cable programming" is defined in §605(d) as "video programming which is *transmitted via satellite* and which is primarily *intended for the direct receipt by cable operators for their retransmission* to cable subscribers." 47 U.S.C. §605(d)(1) (emphasis added). The plain meaning of this language is that the term refers to over-the-air satellite signals *before* their receipt by cable operators. It is clear that the signals must be *intended for receipt* by the operators; however, once they have been received and retransmitted to subscribers through coaxial cable, they no longer fall within the definition. *United States v. Norris*, 833 F. Supp. at 1398-1399.

Congress amended §605(e)(4) to include the language referring to "satellite cable programming" in 1988, only four years after it enacted §553. As the court observed in *Norris*, "[i]t would be superfluous for Congress to have intended §605(e)(4) [as amended in 1988] to cover the

theft of cable services by use of unauthorized converter or 'black boxes' when Congress had enacted a law regulating the same subject matter four years prior." *United States v. Norris*, 833 F. Supp. at 1399.

Cablevision cites a number of cases decided after the passage of the Cable Act that have held or suggested that the sale of descramblers intended for use in the unauthorized interception of television signals transmitted via coaxial cable may violate §605(e)(4), including *Oceanic Cablevision, Inc. v. M.D. Electronics*, 771 F. Supp. 1019, 1025 (D.Neb. 1991), *Cablevision Systems Corp. v. DePalma*, 1989 WL 8165, *3 (E.D.N.Y.), and *Shenango Cable TV, Inc. v. Tandy Corp.*, 631 F. Supp. 835 (W.D.Pa 1986). These cases placed great reliance on the pre-Cable Act cases that had held §605 to be applicable to the theft of cable-borne signals, and contained no analysis either of the statutory language of §§605(e)(4) and 605(a) or of the applicability of §605 in the light of the enactment of §553. In contrast, the court in *Norris* analyzed the interplay between §§553, 605(a) and 605(e)(4), and held that §553(a), not §605(e)(4), governs the theft of cable-borne television signals. *United States v. Norris*, 833 F. Supp. at 1397-1401, 1403-1404.[5]

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[5] Cablevision also attempts to derive support from decisions such as *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990), *ON/TV of Chicago v. Julien*, 763 F.2d 839 (7th Cir. 1985), *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981), *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980), and *American Television and Communications Corp. v. Floken, Ltd.*, 629 F. Supp. 1462 (M.D.Fla. 1986). These decisions are not on point, however, since they deal with the problem of unauthorized reception of over-the-air, not cable-borne signals.

In view of the statutory language of §§553, 605(a) and 605(e)(4), and of the legislative history of those provisions, I find that §§605(a) and 605(e)(4) are not applicable to Noel's conduct in this case. Accordingly, Cablevision's motion for summary judgment on its §605 claim is denied, and Noel's cross-motion to dismiss that claim is granted.

(2) *Relief under §553*

(a) *Damages*

Cablevision seeks damages under 47 U.S.C. §553(c)(2)(B) for Noel's conceded violations of §553(a)(1). Computation of damages is governed by §§553(c)(3)(A)-(C).

Damages for a violation of §553(a)(1) may be calculated by one of two methods. An aggrieved party may recover the actual damages suffered as a result of the violation, plus the amount of any profits obtained by the violator that are attributable to the violation but are not taken into account in computing actual damages. 47 U.S.C. §553(c)(3)(A)(i). In the alternative, the aggrieved party may recover statutory damages for all violations involved in the action, in a sum of not less than $250 and not more than $10,000. 47 U.S.C. §553(c(3)(A)(ii).[8] Where the court finds that a violation was committed willfully and for purposes of commercial advantage or private financial gain, it may, in its discretion, increase a damage award by not more than $50,000. 47 U.S.C. §553(c)(3)(B).

[8] Cablevision argues that under §553(c)(3)(A)(ii), aggrieved parties are entitled to a separate award of statutory damages for *each* violation of §553(a). This is clearly incorrect. *See International Cablevision, Inc. v. Sykes*, 997 F.2d at 1007 (comparing the language of §553(c)(3)(A)(ii) with that of the parallel provision in §605, §605(e)(3)(C)(i)(II), which provides specifically for separate statutory damage awards for each violation).

On the other hand, where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of §553, it may reduce the award to a sum of not less than $100. 47 U.S.C. §553(c)(3)(C). *See International Cablevision, Inc. v. Sykes,* 997 F.2d at 1005-1006.

Cablevision states in its complaint that it cannot practically determine the actual damages it has suffered as a result of Noel's unlawful conduct. As a result, I can only compute damages by reference to the statutory damage provisions of §§553(c)(3)(A)(ii), 553(c)(3)(B) and 553(c)(3)(C).

Under §553(c)(3)(A)(ii), the court has broad discretion to assess damages within the statutory limits, "as the court considers just." 47 U.S.C. §553(c)(3)(A)(ii). One court has held that the factors to be taken into account in determining what damages are "just" include " 'the pecuniary loss sustained by the victim as a result of the offense, the financial resources of the defendant, . . . the financial needs and earning ability of the defendant . . . as well as the burden that a damage award would impose on the defendant relative to the burden alternative relief would impose." *Cablevision Systems Corp. v. DePalma,* 1989 WL 8165 at *6 (quoting *Cablevision Systems Development Corp. v. Cohen,* CV-84-1155 (E.D.N.Y. May 20, 1988). Citing this language, Noel urges that an award of no more than $250 per violation is justified, based upon his modest financial circumstances, the portrayal of himself as "a responsible, upstanding elderly citizen of a middle-income community," and the assertion that "a large damage award would be an unbearable burden . . . given his age, responsibility to a deaf and elderly wife and limited income." Item 12, pp. 8-9.

Cablevision argues, on the other hand, that the court should impose the maximum statutory damages available under §553(c)(3)(A)(ii), because, it claims, Noel was "engaged in a substantial retail over the counter decoder business sales [sic]," and he directed a "concerted effort" against Cablevision. It maintains that such an award will act to prohibit Noel from "reaping the benefit of his criminal enterprise and encourage other cable operators to attack theft." Item 5, pp. 18-21.

My own reading of §553(c)(3)(A)(ii) is that, since it provides for statutory damages as an alternative to a computation based on actual damages and violators' profits, determinations of what damages are "just" are most appropriately based, at least in the first instance, upon consideration of the likely pecuniary losses to the plaintiff and profits made by the violator. In this case, the record establishes that Noel sold two descramblers to Cablevision's agents, for a total of $600. There is no evidence to support Cablevision's assertion that he had engaged in a substantial retail business in decoder sales, Indeed, there is no hard evidence that he sold any more than the two descramblers he sold to the company's agents.[7] Cablevision has not attempted to place any evidence in the record to establish the pecuniary loss it would be likely to suffer as a result of the illegal sale and use of two descramblers. Neither does the record establish how much Noel paid for the descramblers. I can only suppose that his profit would have been a good deal less than the $600 he received for them. On this basis, I find no reason to assess damages under §553(c)(3)(A)(ii) at more than the statutory minimum of $250.

[7] The transcript of the conversation recorded between Noel and Cablevision's agents on April 18, 1991 indicates that Noel told the agents that "I don't sell that many, just once in a while." Item 16, Ex. A, p. 10.

Consequently, I do not need to decide whether it would be appropriate to consider, under §553(c)(3)(A)(ii), the financial burden placed on Noel by an award of such damages.

Cablevision urges that the court increase the award of damages by $50,000 pursuant to 47 U.S.C. §553(c)(3)(B), on the basis that Noel's violations were "committed willfully and for purposes of commercial advantage or private financial gain." Item 5, pp. 21-22; Item 16, ¶¶4-8. I find no reason to do so. Noel apparently told Cablevision's investigators that he did not make any money selling the descramblers, but that he "just like[d] to screw the cable company." Item 12, Ex. A. While this may suggest a certain willfulness, as does the clear evidence that Noel was fully aware of the illegality of the use of the descramblers,[8] it refutes the notion that the sales were made for purposes of commercial advantage or private financial gain. There is nothing in the record to establish that Noel's purpose was to profit financially from his descrambler sales.

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[8]The Supreme Court has defined "willful" in the context of a civil statute as conduct showing "disregard for the governing statute and an indifference to its requirements." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 (1985) (citing *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 242-243 (1939)). This standard has been applied in consideration of the willfulness of the theft of subscription television and satellite signals, for purposes of the enhancement of statutory damages under 47 U.S.C. §605(e)(3)(C)(ii). *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d at 851-852; *see also, ON/TV of Chicago v. Julien*, 763 F.2d at 844. *Cf. N.A.S. Import, Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992) (for purposes of awarding enhanced statutory damages under the Copyright Act, 17 U.S.C. §504(c)(2), an infringement is willful if the defendant had knowledge that its actions constituted infringement).

Equally, I find no reason to reduce the award of damages pursuant to §553(c)(3)(C), which provides for a reduction to not less than $100, in the court's discretion, "where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section." 47 U.S.C. §553(c)(3)(C). There is evidence that Noel warned Cablevision's investigators that the use of the descramblers was illegal, that they should hide them from the cable company, and that they should be careful who they talked to about the units. Noel maintains that although he knew the use of the descramblers was illegal, he did not know that their sale was prohibited. However, while it is conceivable that he did not actually know that the sale of descramblers was unlawful, I find that his knowledge that their *use* was illegal gave him some reason, at least, to suspect that the sales may not have been legal. No reduction under §553(c)(3)(C) is warranted.

(b) *Injunctive Relief*

Cablevision seeks an order pursuant to 47 U.S.C. §553(c)(2)(A) enjoining Noel or anyone working for or with him from further sale, modification or distribution of electronic devices designed for unauthorized reception of its cable services. Under §553(c)(2)(A), the court is authorized to grant temporary and final injunctions on such terms as it deems reasonable to prevent or restrain violations of §553(a)(1). Under the circumstances of this case, I find that no injunctive relief is necessary to restrain Noel from committing further violations of §553(a)(1). Cablevision's request for such relief is denied.

CONCLUSION

Cablevision's motion for summary judgment under 47 U.S.C. §553 is granted. Its motion for summary judgment on its 47 U.S.C. §605 claim is denied. Noel's cross-motion to dismiss the 47 U.S.C. §605 claim is granted. Statutory damages are awarded to Cablevision under 47 U.S.C. §553(c)(3)(A)(ii), in the amount of $250.00.

So Ordered.

s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: August 1, 1994

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing With Suggestion for Rehearing *in banc* Dated May 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007
GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of May one thousand nine hundred and ninety-six.

UNITED STATES COURT OF APPEALS
FILED
MAY 10, 1996
GEORGE LANGE III, CLERK
SECOND CIRCUIT

Dkt No: 94-7887

International Cable,

v

sykes.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the the appellees JOHN SYKES and MARVIN NOEL.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

s/ By: BETH J. MEADOR,
Beth J. Meador,
Administrative Attorney

No. 96-219

Supreme Court, U.S.
FILED
SEP 9 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MARVIN NOEL,

Petitioner,

vs.

INTERNATIONAL CABLEVISION, INC. d/b/a ADELPHIA CABLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

1. Whether petitioner failed to meet the jurisdictional requirement of this Court that he file a timely petition for a writ of certiorari where petitioner neglected to file the petition within 90 days after entry of the lower court's judgment, petitioner did not toll the running of this 90-day period by filing a timely petition for rehearing in the court below, and petitioner did not file any motion to extend the time within which to file his petition for a writ of certiorari in this Court?

2. Whether Section 605 of Title 47, United States Code, protects cable television operators against the sale and distribution of "pirate" descramblers used to steal cable programming services that originate as radio communications and are retransmitted by cable television operators over coaxial cable wiring?

STATEMENT PURSUANT TO RULE 29.6

Respondent International Cablevision, Inc. ("International Cablevision"), a corporation organized under the laws of New York, is a wholly-owned subsidiary of Chauncey Communications Corporation ("Chauncey"), a Delaware corporation. Chauncey is in turn wholly owned by Adelphia Communications Corporation, a publicly traded Delaware corporation. Respondent International Cablevision has no subsidiary company within the meaning of Rule 29.6 of the Rules of the Supreme Court of the United States.

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APPENDIX

Appendix A — Notice of Motion Filed March 7, 1996 .. R.A. 1

Appendix B — Order Filed March 29, 1996 ..... R.A. 5

STATEMENT OF JURISDICTION

Section 2101(c) of Title 28, United States Code, invests this Court with jurisdiction provided a petition for a writ of certiorari is filed within 90 days of the entry of the judgment below. The judgment of the Court of Appeals for the Second Circuit was entered on January 26, 1996 and the mandate issued on February 16, 1996. On March 1, 1996, more than 14 days following the entry of the judgment, petitioner belatedly submitted a petition for rehearing, which the clerk in the court below rejected as untimely. After petitioner filed a motion, dated March 7, 1996, for an extension of time within which to file his petition for rehearing, the Second Circuit, by order dated March 29, 1996, granted this out-of time motion "to the extent that the petition for rehearing may be filed" and expressly refused to recall the mandate. (R.A. at 7).[1] On May 10, 1996, the lower court denied the petition for rehearing without reviewing the merits of the underlying judgment. (A. at 51). On August 8, 1996, exactly 90 days after the May 10 order, and more than 190 days after the lower court's entry of judgment on January 26, petitioner belatedly filed the petition for a writ of certiorari.

ADDITIONAL STATUTORY PROVISION

Section 2101(c) of Title 28, United States Code provides as follows:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the

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1. References to respondent's appendix will be in the form (R.A. at __) and references to petitioner's appendix will be in the form (A. at __).

> Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

COUNTER STATEMENT OF THE CASE

On two separate occasions in April 1991, petitioner sold a "pirate" cable descrambler, more commonly known as a black box, to undercover investigators employed by respondent. (A. at 29). "Pirate" cable descramblers allow subscribers with basic cable service to obtain "premium" channels, such as HBO or Showtime, without paying the correspondingly higher fees. During the first sale on April 9, 1991, petitioner asserted that he did not make money from selling descramblers but "just like[d] to screw the cable company." (A. at 47). Later on April 18, 1991, petitioner sold a second descrambler to undercover investigators, and in a taped conversation of the sale, explained how to connect the descrambler, warned the investigators to hide the descrambler from the cable company as it was "illegal," and admitted to selling a few other descramblers.[2] (A. at 29-30, 46 n.7).

To halt this unlawful conduct, respondent commenced an action in the United States District Court for the Western District of New York against petitioner, seeking damages and injunctive relief under sections 553 and 605 of the Cable Communications Policy Act of 1984 (the "1984 Act"). (A. at 27). Statutory damages under section 553 range from a minimum of $250 to a maximum of $10,000, 47 U.S.C. § 553(a)(1) and (c)(3)(A)(ii), and under section 605, range from a minimum of $10,000 to a maximum of $100,000. 47 U.S.C. § 605(a), (e)(3)(C)(i)(II).

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2. For a fuller recitation of the facts, respondent refers the Court to the opinion below. (A. at 11-14).

The district court granted respondent's motion for summary judgment on the section 553 claim, fixing respondent's statutory damages at $250. (A. at 44, 46). However, the district court granted petitioner's motion to dismiss respondent's section 605 claim, ruling that the proscriptions of section 605 did not extend to the retransmission of cable television programming over coaxial cables, and therefore did not apply to petitioner's unlawful conduct. (A. at 42, 44).

The Second Circuit vacated the district court's erroneous decision on January 26, 1996, and remanded the case for the imposition of the enforcement remedies available under section 605. (A. at 26). In reversing the district court, the Second Circuit engaged in a painstaking study of section 605, which included analysis of pertinent provisions of the 1984 Act, the Communications Act of 1934 (the "1934 Act"), and amendments to the 1934 Act in 1968; examination of the legislative history of the 1984 Act; and review of judicial interpretations of section 605, both prior to and after the passage of the 1984 Act. The Second Circuit then concluded that because respondent's distribution of cable television programming involved the receipt of radio signals by satellite, "the continued transmission of radio signals via cable . . . can be regarded as the 'receipt, forwarding, and delivery of [radio] communications . . . incidental to [the transmission]' . . . within the meaning of [the pertinent definitional section of 1984 Act, 47 U.S.C.] § 153(b)." (A. at 10, 20). Accordingly, the Second Circuit held that section 605 applied to the "distribution of descramblers for the interception of cable television . . . and therefore to the conduct of . . .[petitioner] Noel that is at issue on this appeal." (A. at 24).

REASONS FOR DENYING THE WRIT

The petition does not merit this Court's consideration. First, petitioner has failed to satisfy the jurisdictional requirement of

Section 2101(c) of Title 28, United States Code, that his petition be filed within 90 days of the entry of judgment. By failing to file the petition for a writ of certiorari within 90 days of the entry of the lower court's judgment, by neglecting to file a timely petition for rehearing in the court below, and by not moving in this Court to extend the time within which to file his petition, petitioner can no longer seek to invoke the jurisdiction of this Court.

In addition, there are no "compelling reasons" warranting this Court's consideration of the instant case. *See* Sup. Ct. R. 10. The conflict between the Second and Seventh Circuits is based upon a narrow issue of statutory construction, and its only practical effect is to permit different penalties to apply to what is concededly unlawful activity. This conflict does not subject cable companies or cable "pirates" to contradictory mandates. Nor does it provide companies that do business in several judicial circuits, such as respondent, with intolerably uncertain guidance in the conduct of their business affairs. The question presented would also benefit from insights provided by lower courts that may consider this issue. Finally, the Second Circuit fully considered and correctly resolved the issues presented.

I.

THE PETITION IS JURISDICTIONALLY DEFECTIVE.

For a petitioner to clothe this Court with jurisdiction, he must file his petition for a writ of certiorari "within ninety days after the entry of [the] judgment," 28 U.S.C. § 2101(c), unless the petitioner either filed a "timely" petition for rehearing in the lower court, Sup. Ct. R. 13.3, or moved for an extension of time to file his petition for a writ of certiorari in this Court, Sup. Ct. R. 13.5. As petitioner here met none of these jurisdictional requirements, his petition for a writ of certiorari should be denied.

Section 2101(c), of Title 28, United States Code, supplies the general rule governing the filing of certiorari petitions in civil cases and invests this Court with jurisdiction only when a petitioner files the petition "within ninety days after the entry of [the] judgment . . . ."[3] "This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). By filing his petition for a writ of certiorari on August 8, 1996, more than 190 days after the entry of the judgment on January 26, 1996, petitioner has failed to satisfy this 90-day jurisdictional rule.

Petitioner also did not file a timely petition for rehearing in the court below, which would have tolled the start of the 90-day period. *See* Sup. Ct. R. 13.3. A *timely* petition for rehearing suspends the finality of the underlying judgment until either the denial of the petition for rehearing or the subsequent entry of judgment upon the grant of a rehearing. *See* Sup. Ct. R. 13.3; *Missouri v. Jenkins*, 495 U.S. at 46 (1990); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942).

The court below entered its judgment on January 26, 1996. Pursuant to Fed. R. App. Proc. 40, petitioner had 14 days from the "entry of judgment," or until February 9, 1996, within which to file a timely petition for rehearing, a deadline that petitioner failed to meet by not submitting any petition for rehearing until March 1, 1996. When the lower court rejected this petition for rehearing as untimely, counsel for petitioner moved, on March 7, 1996, to enlarge the time within which to file the petition for rehearing, claiming that his tardiness stemmed from his erroneous belief that the 14-day period ran from the issuance of

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3. To invoke the jurisdiction of this Court, petitioner cites to only one provision, 28 U.S.C.§ 1254 (*see* Petition at 1), a statute which merely recites that this Court may review decisions of the Courts of Appeals by means of a writ of certiorari. Petitioner omits any reference to 28 U.S.C. § 2101(c), which reference would, if made, alert this Court to the 90-day jurisdictional time limit. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

the mandate on February 16, 1996. By order dated March 29, 1996, the lower court granted the out-of-time motion "to the extent that the petition for rehearing may be filed" and expressly refused to recall the mandate. (R.A. at 7). On May 10, 1996, the lower court denied the petition for rehearing, (A. at 51), and on August 8, 1996, petitioner filed his petition for a writ of certiorari.

Only if the 90-day filing period began to run anew from the lower court's denial of the untimely petition for rehearing would the petition before this Court be timely. An untimely petition for rehearing generally does not toll the running of time for filing a petition for a writ of certiorari. *Pfister v. Northern Ill. Fin. Corp.*, 317 U.S. 144, 150-51 (1942). The sole exception to this well-established rule occurs when the petitioner can demonstrate that the court below entertained or considered the untimely petition for rehearing on its merits. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 n.1 (1952) (petition for certiorari filed within 90 days of lower court's second judgment was timely where untimely motion for clarification was entertained and considered on the merits and the original judgment was modified); *Bowman v. Loperena*, 311 U.S. 262, 265-66 (1940) (petition for rehearing filed out of time but entertained by the court and dealt with upon its merits enlarged the time for taking an appeal).

In this case the court below denied the petition for rehearing without any apparent reexamination of the grounds for its original order.[4] Indeed, by not recalling its mandate, the lower

4. In *Pfister*, this Court concluded that an order denying a petition for rehearing on the merits would show "a refusal to modify the original order." 317 U.S. at 150-51. The Court therefore held that the lower court had not entertained or considered the merits of a petition for rehearing where the order denying the petition stated "there is no equity or merit in the petition for rehearing." *Id.* at 151.

court clearly signaled that it did not mean to disturb the finality of its prior judgment. Thus, the legal rights and obligations of the parties and the finality of the judgment for purposes of review were fixed well before the lower court's denial of the petition for rehearing. *See Department of Banking v. Pink*, 317 U.S. 264, 266-67 (1942) (post-judgment motion that did not suspend the finality of the judgment did not toll the running of the period in which to file a petition for certiorari). Petitioner cannot establish, therefore, that the denial of the petition for rehearing extended petitioner's time to appeal beyond 90 days following the entry of the January 26, 1996 judgment. *Pfister* at 150.

Petitioner also did not file a motion in this Court to extend the time period within which to file the petition for a writ of certiorari. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5. Thus, having taken no steps to avoid the rigors of the 90-day rule, petitioner cannot now invoke this Court's jurisdiction by filing a tardy petition.[5] Accordingly, the petition for a writ of certiorari should be denied.

II.

PETITIONER HAS FAILED TO PRESENT COMPELLING REASONS THAT WOULD JUSTIFY THE GRANT OF A WRIT OF CERTIORARI.

In urging this Court to grant certiorari, petitioner makes a solitary argument — a conflict between the Second and Seventh

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5. Additionally, since counsel's "mistake" in determining when to file his petition for rehearing cannot qualify as "good cause," under Fed. R. App. Proc. 26(b), *see Shumar v. United States*, 423 U.S. 879, 881 (1975) (Douglas, Brennan, and Marshall, JJ., dissenting from denial of certiorari) ("If the good-cause requirement of Rule 26(b) possesses any meaning at all, the inadvertence of a litigant cannot qualify as good cause"), the lower courts grant of leave to file the petition out of time was groundless and therefore, the petition for rehearing was totally ineffective with respect to that court's original order.

Circuits regarding the issue of whether section 605 applies to the transmission of radio transmissions over coaxial cables needs to be resolved. (Petition at 6-7). This solitary factor provides the Court with no "compelling reason" to grant certiorari.

A. The Asserted Conflict Is Tolerable And Review By This Court Would Be Premature.

Not all conflicts between circuits need to be resolved by this Court. "Some conflicts are tolerable. Others can be resolved more effectively by Congress." *Hiersche v. United States*, 503 U.S. 923, 925 (1992) (Stevens, J., respecting the denial of certiorari). The apparent conflict in the instant case is eminently "tolerable." Confined to two circuits, the existing conflict merely allows different penalties to apply to conduct which all parties concede is unlawful. The conflict does not subject any party to conflicting statutory commands, nor does it create intolerably uncertain guidance concerning the affairs of businesses operating in several judicial circuits. Thus, this conflict, which is narrow both in terms of the number of circuits involved and its practical consequences, need not be resolved by the Court at this time. *See, e.g., Walker v. United States*, 506 U.S. 967 (1992) (certiorari denied despite recognized conflict among eight of the federal courts of appeal); *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (certiorari denied despite acknowledged conflict among five of the federal courts of appeal).

This Court's review of the narrow statutory construction issue presented should be deferred to permit other courts of appeals "to weigh in on one side or another of the unsettled issue . . . ." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White J., dissenting from denial of certiorari). Indeed, as Justice Stevens has noted:

> experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Justice Stevens, *Some Thoughts on Judicial Restraint,* 66 Judicature 177, 183 (1982). Thus, for this Court to address the issue now without the benefit of the views of these other courts would be premature, unwarranted, and inconsistent with this Court's well-established "policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). *See also McCray v. New York,* 461 U.S. 961, 963 (1983) (Stevens, Blackmun, Powell, JJ., respecting the denial of certiorari) (recognizing that "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court").

B. The Decision Below Was Correct.

In addition, because the Second Circuit correctly decided the statutory construction issue, no manifest injustice will result from the decision below. The pivotal question, as phrased by the court below, was "whether the descramblers sold by . . . [petitioner] Noel were intended to be used to 'receive . . . any . . . communication by radio' within the meaning of the third sentence of § 605(a), an inquiry that requires examination of the definition of 'communication by radio' in [the definitional section of the 1984 Act, 47 U.S.C.] § 153(b)." (A. at 15).

Recognizing that respondent simultaneously retransmits satellite-delivered cable television program signals to its customers, the lower court held that:

> [t]he continued transmission of radio signals via cable after their receipt at the headend of a cable television system can be regarded as the "receipt, forwarding, and delivery of [radio] communications . . . incidental to [the transmission]" of the pictures and sounds transmitted by those communications within the meaning of §153(b).

(A. at 20).

The lower court's decision is amply supported by the legislative history of the 1984 Act, pre-1984 decisions that consistently interpreted section 605 as prohibiting the interception of cable television programming, and post-1984 decisions that have held section 605 applicable to the conduct at issue in this case.

Among the legislative history relied upon was House Report No. 934, 98th Cong., 2d Sess. 83 (1984), *reprinted in* U.S.C.C.A.N. 4655, 4720, which discussed the newly enacted section 553. The Second Circuit reviewed this Report, which reads in part:

> [e]xisting section 605 of the Communications Act of 1934 includes a prohibition against the unauthorized reception of communications services. *Nothing in [§ 553] is intended to affect the applicability of existing Section 605 to theft of cable service, or any other remedies*

> *available under existing law for theft of service.*

(A. at 21) (emphasis in opinion). The Second Circuit concluded that "in view of the uniform prior judicial interpretation of § 605 as applicable to the theft of cable service, the . . . emphasized passage . . . was intended to make clear that § 605 would continue to be so applicable." (A. at 22).

The Second Circuit's conclusion was further buttressed by the statement of Senator Robert W. Packwood, chairman of the Senate Committee on Commerce, Science and Transportation, the committee responsible for the 1984 Act:

> H.R. 4103 as reported by Committee recodifies without modification section 605 to the Communications Act of 1934 as new section [605](a). *In amending existing section 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications.* Over the years federal courts, consistent with congressional intent, have recognized that section 605 provided broad protection against the unauthorized interception of various forms of radio communications. *It is the Committee's intention* that the amendment preserve these broad protections; *that all acts which presently constitute a violation of present 605 shall continue to be unlawful under that section as amended and redesignated by H.R. 4103.*

(A. at 23) (emphasis in opinion). Senator Packwood's statement emphasized the point made in the House Report — that Congress expected 605 to continue its role in combatting cable signal piracy and intended the overlap between the coverage of section 605 and that of section 553.

In *United States v. Norris*, 88 F.3d 462 (7th Cir. 1996), the Seventh Circuit did not adopt the Second Circuit's interpretation of the statutory scheme, nor its determination that the continued transmission of radio signals via cable does not change the nature of the communication. The Seventh Circuit concluded instead that section 605 did not extend to the retransmission of radio communications over coaxial cables because it decided that radio transmissions cease being radio communications and become wire communications at the discrete point at which they are retransmitted by coaxial cables. 88 F.3d at 467-68.

The Seventh Circuit's dichotomy between radio and wire communications is false. First, in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 (1968), this Court held that the simultaneous retransmission of radio communications is a "stream of communication [that] is essentially uninterrupted and properly indivisible." Second, the definitions of wire and radio communications are not mutually exclusive. As the Second Circuit emphasized, the statutory definition of radio communications includes "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." (A. at 15, quoting 47 U.S.C. § 153(b)). The Second Circuit acknowledged the obvious statutory overlap, but appropriately noted that "[a]lthough the resulting interplay and overlap between §§ 553 and 605 may not demonstrate 'a convenient and inviting sense of order,' (citation omitted) it is for Congress, not the courts to address any perceived resulting disorder (citation omitted)." (A. at 25).

In conclusion, the Second Circuit, in view of the broad definitional language of section 153(b), the uniform judicial authority prior to 1984 holding section 605 applicable to cable communications, and pertinent legislative history, correctly concluded that Congress intended section 605 to apply to the retransmission of cable television programming over coaxial cable where such programming originated as radio communications. Thus, the conflict between the Second and Seventh Circuits presents this Court with no "compelling reason[ ]" to review the decision below. *See* Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A
NOTICE OF MOTION FILED MARCH 7, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied
by supporting affidavit (Local Rule)

Docket No. 94-7887, 7889

NOTICE OF MOTION

for *Withdrawal and Mandate and Enlargement of Time to File Petition For Rehearing*

International Cable

v.

Sykes

International Cable

v.

Noel

MOTION BY:

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Appendix A

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212/424/-8000

Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired? *(Substantive motions only)*	☐ Yes	☒ No

* * *

Has argument date of appeal been set:

A. by scheduling order?	☒ Yes	☐ No
B. by firm date of argument notice?	☒ Yes	☐ No

C. If Yes, enter date: *original appeal was argued May 17, 1995*

Judge or agency whose order is being appealed: *Hon. John T. Curtin, United States District Judge, W.D.N.Y.*

Appendix A

Brief statement of the relief requested: *Withdrawal of mandate and enlargement of time for filing Petition for Rehearing.*

* * *

By: s/ *Rodney O. Personius*
Rodney O. Personius, Esq.

Appearing for:
Noel and Sykes

Date
March 6, 1995

Appellees:
☐ Plaintiff ☑ Defendants

Previous requests for similar relief and disposition: *N/A*

Statement of the issue(s) presented by this motion: *Should the mandate be withdrawn and the time for filing a petition for rehearing enlarged?*

Brief statement of the facts: *On January 26, 1996, a panel of this Court vacated and remanded the District Court's determination. Counsel for defendants-appellees mistakenly understood that the issuance of the mandate constituted the entry of "Judgment" for purposes of Federal Rule of Appellate Procedure 40(a). Although counsel was provided with a copy of the opinion of the Court, no notice of entry of judgment was received. A Petition for Rehearing was then filed within 14 days of the date upon which the mandate was issued, again under the mistaken understanding issuance of the mandate constituted*

entry of judgment. As such, the Petition for Rehearing was submitted to the Court for filing on March 1, 1996.

Summary of the argument: *Counsel for defendants-appellees prepared and submitted for filing a Petition for Rehearing upon the good faith, albeit mistaken, belief that the 14 day time period for filing such a petition was to be measured from the date the mandate was issued. This incorrect understanding was premised upon the belief the mandate constituted the "Judgment" of the Court. Counsel believes the Petition raises a meritorious issue of statutory construction under Title 47 in relationship to the statutory definitions of wire communications and radio communications under Section 153 of that statute. The identical issue is now pending before the Seventh Circuit Court of Appeals in the matter captioned United States of America v. William C. Norris, Dkt. No. 95-1402. As the matter has been vacated and remanded to the District Court it is not believed the granting of this request for a withdrawal of the mandate and enlargement of the time for filing a Petition to March 1, 1996 will work any prejudice on plaintiff-appellant. The sole issue to be determined upon remand concerns the assessment of penalties and costs in favor of plaintiff-appellant.*

APPENDIX B
ORDER FILED MARCH 29, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied
by supporting affidavit (Local Rule)

Docket No. 94-7887, 7889

ORDER

for *Withdrawal and Mandate and Enlargement of Time to File Petition For Rehearing*

International Cable

v.

Sykes

International Cable

v.

Noel

MOTION BY:

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Appendix B

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Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

* * *

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: *original appeal was argued May 17, 1995*

Judge or agency whose order is being appealed: *Hon. John T. Curtin, United States District Judge, W.D.N.Y.*

Appendix B

Brief statement of the relief requested: *Withdrawal of mandate and enlargement of time for filing Petition for Rehearing.*

* * *

IT IS HEREBY ORDERED that the motion be and it hereby is granted to the extent that the petition for rehearing may be filed. The mandate will not be recalled.

s/ Frank X. Altimari
s/ J. Daniel Mahoney
s/ John M. Walker Jr.

March 29, 1996

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MARCH 29, 1996
GEORGE LANGE III, CLERK